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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 653.

NEW YORK STOCK EXCHANGE,
Petitioner,

v.

WILLIAM H. LEGATE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION OF NEW YORK STOCK EXCHANGE FOR A WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1964.

No. 633.

NEW YORK STOCK EXCHANGE,
Petitioner,

v.

WILLIAM H. LEGATE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION OF NEW YORK STOCK EXCHANGE FOR A WRIT OF CERTIORARI.

Statement of the Case.

On September 9, 1960, the stock-brokerage firm of du-Pont, Homsey & Co. (hereinafter called "firm") and also the senior and managing general partner thereof, Anton E. Homsey (hereinafter called "Homsey"), were suspended from the New York Stock Exchange (hereinafter called "Exchange"); and on September 17, 1960, an equity receiver was appointed (R. 82) in a civil action brought on that date by the Securities & Exchange Commission (R. 259).

Some time after the receivership this respondent learned (*inter alia*) the following facts: that during the career of

the firm as a member of the Exchange it had committed many violations of the Securities & Exchange Act (hereinafter called "Act") and of the rules and regulations adopted pursuant thereto, as well as the rules of the Exchange; that for a number of those violations the Exchange had imposed warnings and actual fines, and had also imposed upon the firm in 1955 a reduced status involving more burdensome capital requirements and a lower ratio between capital and aggregate indebtedness (R. 119); that under date of November 12, 1958, the Exchange issued a warning regarding the firm's very large holdings of speculative shares which had but a limited market (Ex. 58, R. 151); and that a report by an Exchange examiner (Beliakow) charging the firm with a number of violations was discussed by that examiner with Homsey early in February, 1959 (R. 147).

The Exchange, having assumed under the Act the duty of supervision over its members and being engaged since 1956 in carrying on a massive advertising program urging the public to place trust and confidence in its members (R. 135), submitted a proposal in the receivership proceedings shortly after the commencement thereof (R. 12). Avowedly in accordance with that proposal, there was filed on November 3, 1960 (R. 11), the "Receiver's Plan for Partial Liquidation" (hereinafter called "PLAN"), together with a petition for approval thereof. On the same day an order of notice "to all interested parties" was issued on such petition (R. 4 and 268). On November 15, 1960, the return day of such order of notice, after hearing "statements by the Receiver and by counsel for various interested parties," including Marcien Jenckes, Esquire, counsel for the Exchange, the District Court entered an order approving the PLAN and authorizing the receiver to carry out its provi-

sions "provided the obligations of the New York Stock Exchange are fulfilled according to its terms" (R. 37-38).

Among such obligations of the Exchange was its obligation to purchase the claims of certain "special claimants" (R. 12) after said claimants had severally executed and delivered the instruments entitled "Consent, Waiver and Subordination," prescribed by the PLAN, whereby each such special claimant "for himself, his heirs, personal representatives, successors and assigns, . . . irrevocably . . . waives any right to share in any part of the assets now in or hereafter coming into the hands of the receiver or to receive any share thereof unless and until all customers and creditors of the defendant duPont, Homsey & Company have been paid in full . . ." (R. 33 and 34).

As appears by the PLAN, the reason for such subordination was "Because of the doubt as to the firm's solvency and the consequent possibility that the appointment of a receiver constituted an act of bankruptcy," and because the subordination of those claims would render the firm solvent, as shown by the statement of assets and liabilities annexed to the PLAN (R. 22-26), and would thus remove the danger of a creditors' petition in bankruptcy against the firm (R. 13).

Another of the obligations of the Exchange under the PLAN was the obligation to pay all "costs and expenses of administration of the receivership, including allowances to Court appointed attorneys and auditors," if the receivership assets "remaining after the payment of priorities and customers' and creditors' claims . . . are not sufficient therefor" (R. 19).

On December 28, 1960, the Exchange filed in the receivership a statement (R. 84) acknowledging compliance with conditions (b) (c) (d) (e) (f) and (g) of paragraph 7 of the PLAN and waiving compliance with condition (a) thereof, whereupon the PLAN became effective (R. 13).

The subordinated special claims referred to in the PLAN were thereafter purchased by the Exchange, the assignments thereof being taken by it in the name of Marcien Jenckes, Esq., its attorney as its "nominee," pursuant to a form of assignment prescribed by the PLAN (R. 31-33), which expressly referred to the previous execution and delivery of said forms of "Consent, Waiver and Subordination" (R. 32).

In his proof of claim, seasonably filed in the receivership proceedings (R. 38), the respondent (hereinafter called Legate) (1) claimed rescission of an agreement for limited partnership in the firm in connection wherewith $81,162.50 in cash and securities was obtained from him on February 28, 1959 (R. 113), and (2) claimed also a credit balance of $29,735.50 plus certain securities "long" on his customer account with the firm (R. 38-42). The rescission sought in his proof of claim was on the ground that he was induced to enter into the transaction by misrepresentations and by concealment of material facts as to which he did not learn the truth until after the receivership (R. 40).

After the expiration of the four-month period from the date of the receivership and the consequent lapse of the time for the filing of a creditors' petition in bankruptcy by reason thereof, Mr. Jenckes, the attorney for the Exchange and its "nominee," petitioned that the subordinated claims which the Exchange had purchased be allowed as "general creditor" claims (R. 54-56). Legate duly filed objections to that petition (R. 88).

On July 18, 1961, after learning that said Jenckes had been appointed attorney for the receiver, Legate filed a motion to disqualify him, on the ground that there were conflicts of interests between (*a*) the interests of the Exchange, represented by Mr. Jenckes, as its attorney and "nominee," and (*b*) the interests of the receiv-

ership to enforce against the Exchange full performance of the obligations assumed by it under the PLAN, as well as its liability for failure to perform its duties in respect to the firm, and the question of priority, in respect of the alleged excess of assets, as between Legate and the subordinated claims purchased by the Exchange (R. 86-88).

On July 24, 1961, the District Court denied that motion for disqualification (R. 7), in spite of said apparent conflicts of interests, thus leaving the Exchange, through its attorney and "nominee," in effective control over the receivership. Thereafter Mr. Jenckes (being clothed with the mantle of counsel for the receiver) urged, under that cloak, the contentions and interests of the Exchange.

In respect to this use of the name of the receiver for the benefit of the interests of the Exchange, the Court of Appeals says (R. 323):

> "Indeed, although the receiver exists as a separate party, and will have certain personal claims, *the real parties in interest and in competition with each other in the present proceedings are appellant and the Exchange.* This fact is not concealed by the circumstance that the Exchange has assigned its interests to an attorney who, it so happens, is representing the receiver on this appeal. It is to be noted that six pages of the 'receiver's' brief are devoted to arguing that the petition which appellant sought to have heard against the Exchange was properly dismissed for lack of jurisdiction. (Footnote 5) As the Exchange's 'nominee' or alter ego he filed a claim in the general receivership proceedings, and is and was directly financially interested in various aspects, particularly in the receiver's claim against the appellant for failure to disclose Homsey's misdoings. *In fact in the Receiver's Counterclaim which he signed as counsel for the receiver,* it

> was asserted, inter alia, that appellant's non disclosure was a violation of his 'duty to . . . the Exchange.' While, perhaps, this allegation was only a makeweight for the receiver's claim on behalf of the creditors as a whole, it is an apt reminder of who those creditors really are." (Emphasis supplied.)

After waiting more than three months for a move to be made by Mr. Jenckes on behalf of the interests of the receivership against the Exchange, Legate filed, on October 27, 1961, his petition against the Exchange (R. 58-65), which, as duly amended (R. 66), alleged, in substance (*inter alia*), that the Exchange, having registered under the Act, failed and neglected to perform its duties thereunder with respect to the firm; that there was an excess of receivership assets over and above all claims of customers and creditors of the firm as well as all costs and expenses of the receivership (R. 67), except only (*a*) those of Legate and (*b*) those of the Exchange on the subordinated claims purchased by it under the PLAN (R. 67). Legate's petition as amended further averred that "the receiver was in essence and equity merely a stakeholder of said excess of assets," and that in equity Legate was "entitled to the benefit of any and all defenses and counterclaims" of the receiver against the Exchange (R. 67). Legate's petition prayed, *inter alia*, that, as to the alleged excess of assets, it be adjudged that he was entitled to priority over the subordinated claims purchased by the Exchange; and that, to the extent that said surplus of assets of the receivership should not be sufficient to satisfy his claims, the Exchange be ordered to pay an amount equal to such deficit in the receivership assets (R. 64).

Mr. Jenckes filed a motion, as attorney for the receiver, to dismiss said petition, though the relief sought thereby

was against his client, the Exchange. The grounds of this motion to dismiss were lack of jurisdiction over the Exchange, and also that Legate's said claim based on rescission was not entitled to priority over the subordinated claims purchased by the Exchange (R. 65, 66).

On May 1, 1962, the District Court allowed said motion filed in the name of the receiver to dismiss the petition brought against the Exchange (R. 72). An appeal therefrom by Legate was met by a motion in the Court of Appeals, again filed in the name of the receiver, to dismiss for lack of finality (308 F. 2d 228). When Legate petitioned this Court for certiorari to review the allowance by the Court of Appeals of that motion to dismiss, the brief filed in this Court in opposition to certiorari was also in the name of the receiver (372 U.S. 912). However, the Court of Appeals has now reversed the decision rendered by the District Court on May 1, 1962, on the motion to dismiss Legate's petition of October 27, 1961, against the Exchange and has remanded the case for "further proceedings" (334 F. 2d 704). It is this order reversing and remanding that the Exchange seeks to have this Court review by its petition for certiorari.

Reasons why the Petition of the Exchange for a Writ of Certiorari should be Denied.

I. The order of the Court of Appeals which the Exchange seeks to have reviewed by this Court is not a final judgment or decree.

II. The petition of the Exchange fails to comply with the rules of this Court pertaining to a petition for a writ of certiorari by including in its petition alleged copies of two letters (Appendices D and D1) which are not in the

record certified to this Court by the Clerk of the Court of Appeals, which were no part of the record before that Court, which were not offered in evidence, and as to which Legate has had no opportunity to object or to comment as to the admissibility, competence or legal effect thereof.

III. By its various and numerous activities and appearances in the receivership proceedings and by the presentation of its purchased subordinated claims for allowance as general-creditor claims, the Exchange became subject to the Court's jurisdiction on Legate's petition to enforce its obligations to the receivership under the PLAN and its liability under the Act.

IV. The decisions relied upon by the Exchange in its petition for certiorari are readily distinguishable.

Argument.

I. BY ITS PETITION FOR CERTIORARI THE EXCHANGE SEEKS REVIEW OF AN ORDER WHICH IS NOT A FINAL JUDGMENT OR DECREE.

By its recent decision the Court of Appeals reversed the District Court order of May 1, 1962, dismissing Legate's petition of October 27, 1961, for relief against the Exchange, on the motion to dismiss filed in the name of the receiver; and remanded that petition to the District Court for "further proceedings." That such order of the Court of Appeals is not a final judgment or decree has been uniformly held by this Court in a long line of cases, dating back to the Judiciary Act of 1789.

In *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 1 S. Ct. 15 (1882), the defendant's demurrer to the complaint on the ground of lack of jurisdiction was sustained. Upon appeal the Court of Appeals reversed and remanded the case for fur-

ther proceedings. From that reversal the case was brought to the United States Supreme Court by writ of error; and there a motion to dismiss was filed on the ground that the judgment sought to be reviewed "is not a final judgment." In granting the motion to dismiss, this Court, speaking by Chief Justice Waite in a unanimous opinion, says at pages 3-4:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case . . . [Cases cited.] . . . *If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error.* [*Cases cited.*] . . . *The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit.*" (Emphasis supplied.)

In *Forsyth* v. *Hammond*, 166 U.S. 506, 17 S. Ct. 665 (1897), this Court says at page 514:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. *Chicago & Northwestern Railway* v. *Osborne*, 146 U. S. 354."

In *Collins* v. *Miller*, 252 U.S. 364, 40 S. Ct. 347 (1920), this Court says at page 370, in a unanimous decision by Mr. Justice Brandeis citing a number of decisions:

> "A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. [Cases cited.] And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

In *Slaker* v. *O'Connor*, 278 U.S. 188, 49 S. Ct. 158 (1929), where, as in the case at bar, the District Court dismissed a petition for want of jurisdiction and the Court of Appeals reversed and remanded the cause for further proceedings (22 F. 2d 147), this Court dismissed an appeal from the reversal and remand order of the Circuit Court; and even awarded the appellee damages and also costs by way of penalty. Speaking by Mr. Justice McReynolds in a unanimous opinion, this Court said (at p. 189): "Manifestly, the decree below is not final."

In *Catlin* v. *United States*, 324 U.S. 229, 65 S. Ct. 631 (1945), this Court says:

> At page 233: "*A 'final decision' generally is one which ends the litigation on the merits* and leaves nothing for the court to do but execute the judgment. . . ."
>
> At pages 233-234: "The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. . . . 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limita-

tion. One is elimination of delays caused by interlocutory appeals. . . ."

At page 236: "*But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable.* Cf. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. See also *Dieckmann* v. *United States*, 88 F. 2d 902." (Emphasis supplied.)

It is therefore respectfully submitted that the order of the Court of Appeals reversing the order entered by the district judge dismissing Legate's petition of October 27, 1961, for relief against the Exchange, on the motion to dismiss filed in the name of the receiver and remanding the case for further proceedings, is not a final judgment or decree; and that the Exchange petition for certiorari should therefore be denied.

II. The Exchange Violated the Rules of This Court by Including in its Petition for Certiorari Two Letters which were Not Part of the Record Certified by the Clerk of the Court of Appeals.

Rule 21(1) of the rules of this Court expressly sets forth the long-settled policy of this Court that a petition for certiorari is to be determined only upon the record which was before the Court of Appeals. Contrary to this rule and settled policy, the Exchange includes in its petition two purported copies of letters (Appendices D and D1) which are not in the record certified by the clerk of the Court of Appeals. The Exchange petition does not (and cannot) claim that those letters were offered or admitted in evidence; and it is plain that Legate has had no opportunity

to object to their admissibility and competence or to be heard on the legal effect thereof.

It is therefore respectfully submitted that this attempt on the part of the Exchange to circumvent the rule and policy of this Court should not be rewarded by granting certiorari.

III. By its Various and Numerous Activities and Appearances in the Receivership Proceedings and by the Presentation of its Purchased Subordinated Claims for Allowance as General-Creditor Claims, the Exchange Became Subject to the Court's Jurisdiction on Legate's Petition to Enforce its Obligations to the Receivership under the Plan and its Liability under the Act.

In his proof of claim (referred to in his petition of October 27, 1961), Legate claimed creditor status for claims aggregating in excess of $110,000; and the allegations of his petition averred that the only other outstanding claim in the receivership was that of the Exchange on its purchased subordinated claims. In view of this situation the Court of Appeals rightly says: "The real parties in interest and in competition with each other were Legate and the Exchange" (R. 323).

The counsel for the Exchange and also its "nominee" having been appointed as counsel for the receiver, in spite of Legate's objections to such appointment on the ground of conflict between the interests of the receivership and those of the Exchange, no objections, defenses or counterclaims to the Exchange's application for allowance of its subordinated claims had been filed in behalf of the (so to speak) captive receivership, although more than three months had elapsed by October 27, 1961, the date when Legate's petition was filed.

Legate's petition sought enforcement against the Exchange of its obligations under the PLAN to pay into the receivership the amount of any deficit in receivership assets required for the satisfaction of creditor-status claims (R. 58); and also the liability of the Exchange to the receivership by reason of its alleged failure and neglect to perform its duty under the Act.

The various and numerous activities and appearances of the Exchange in the receivership proceedings are shown by the record. It submitted in those proceedings the proposal upon which the PLAN was based (R. 11). It appeared by counsel at the hearing of the petition for approval of the PLAN and expressly assumed "obligations" thereunder, as the order aproving the PLAN states (R. 38). The Court entered orders against it (R. 84 and 85). It filed an answer in those proceedings (R. 75); and on April 12, 20 and 25, 1961, respectively, the Exchange filed motions therein (R. 75); and on July 5, 1961, application was filed for the allowance of the subordinated claims which it had purchased under the PLAN. It seems clear that, by these various appearances and activities in the proceedings, the Exchange had become subject to the jurisdiction of the Court.

In *Wabash Western Railway* v. *Brow*, 164 U.S. 271, 17 S. Ct. 126, this Court said, at page 278:

> "An appearance which waives the objection of jurisdiction over the person . . . may be effected in many ways, and *sometimes may result from the act of the defendant even when not in fact intended.*" (Emphasis supplied.)

In *Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U.S. 286, 27 S. Ct. 285, Mr. Justice Holmes, speaking for the Court, said, at page 290:

"There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. . . . there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit."

In *Alexander* v. *Hillman*, 296 U.S. 222, 56 S. Ct. 204, the Court of Appeals had dismissed a counterclaim petition filed against residents of Pennsylvania who had presented proofs of claim in an equity receivership proceeding pending in the United States District Court of West Virginia. The dismissal of the counterclaim petition by the Court of Appeals was on the same grounds as those urged herein by the Exchange, namely that no formal process had been issued against those Pennsylvania residents, that they had not been served with process, that they had no places of business in West Virginia, and that they were not subject to the jurisdiction of the Court. Though those Pennsylvania residents had done nothing more in that receivership proceeding than to present proofs of claim, this Court reversed the Court of Appeals and held that those Pennsylvania residents had thereby submitted to the jurisdiction of the receivership Court, saying, in a unanimous opinion:

At pages 238-239: "Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims."

At page 239: "*Treating their established forms as flexible, courts of equity may suit proceedings and*

remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them. See Story, Equity Jurisprudence, 14th ed., § 28." (Emphasis supplied.)

At page 241: "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 [Judicial Code, 28 U.S.C. § 112] to the contrary notwithstanding."

At page 243: "*Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere.*

"It is clear that, under the circumstances disclosed, the restrictions laid by the Circuit Court of Appeals upon the receivership court are not consistent with that freedom as to procedure that necessarily belongs to courts of equity administering receiverships. [Cases cited.]" (Emphasis supplied.)

In the case at bar the Exchange had, by its various and numerous activities in the receivership proceedings referred to above, done much more than merely present its claim for allowance; and the long-established principle of equity referred to in Story on Equity Jurisprudence and set forth in the *Alexander* case was even more applicable, namely that:

> "courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them." (296 U.S. 239.)

The receivership in the *Alexander* case was not an instance of a captive receivership; and the counterclaim petition against the Pennsylvania residents was therefore promptly filed by the receiver. In the case at bar, however, all creditor-status claims having been provided for from receivership assets, the situation was such that the receiver was a mere "stakeholder" as alleged in the petition (R. 67). No move against the Exchange was made in behalf of the receivership by Mr. Jenckes, who, though representing the Exchange, had nevertheless been appointed counsel for the receiver over Legate's objections. Legate's petition against the Exchange, filed after a lapse of three months, without any action having been taken against it in behalf of the receivership, sought, in substance, "appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights" against the Exchange, to use the above-quoted apt language of the *Alexander* case.

Legate's petition shows on its face that the matters raised thereby involved the receivership estate and the assets thereof, which properly included, not only the excess of receivership assets averred to be on hand, but also the obligations of the Exchange under the PLAN and its liability under the Act.

It is therefore respectfully submitted that the Court of Appeals properly vacated the judgment of the District Court and remanded Legate's petition for "further proceedings"; and that the Exchange petition for certiorari should not be granted.

IV. THE DECISIONS RELIED UPON BY THE EXCHANGE IN ITS PETITION FOR CERTIORARI ARE READILY DISTINGUISHABLE.

The Exchange petition for certiorari cites a number of cases on the question of what constitutes "doing business."

Those cases have no application to the issue whether the active participation of the Exchange in the receivership proceedings and the filing of the petition for allowance of its subordinated claims constituted submission to the jurisdiction of the Court.

Nor do the bankruptcy cases cited in the Exchange petition have any bearing. The equity jurisdiction of Bankruptcy Courts is limited, not plenary.

1 Remington on Bankruptcy (5th ed.), §§ 22 and 35.

Sylvan Beach, Inc., v. *Koch*, 140 F. 2d 852, 861 (C.C.A. 8th, 1944).

Evarts v. *Eloy Gin Corp.*, 204 F. 2d 712 (C.A. 9th, 1953); cert. den. 346 U.S. 876, 74 S. Ct. 129.

The summary jurisdiction cases referred to in the Exchange petition are not relevant. In such cases there are no formal pleadings; they are frequently decided *ex parte*, on mere affidavits, and without a full hearing.

Central Republic Bank & Trust Co. v. *Caldwell*, 58 F. 2d 721 (C.C.A. 8th, 1932), at pp. 731 and 732.

It therefore seems clear that such cases have no application to the instant case, where the remand order of the Court of Appeals for "further proceedings" assures the Exchange a full hearing by a Court clothed with plenary equity powers.

V. Conclusion.

It is therefore respectfully submitted that the petition of the Exchange for a writ of certiorari should be denied.

Respectfully submitted,

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Dated at Boston, Massachusetts, November 25, 1964.